No. 12716
No. 12813

In the United States Court of Appeals for the Ninth Circuit

SECURITIES AND EXCHANGE COMMISSION, APPELLANT

vs.

WILLIAM J. COGAN, APPELLEE

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vs.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY, ET AL., APPELLEES

CHARLES T. JONES, APPELLANT

vs.

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SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY, ET AL., APPELLEES

BRIEF FOR APPELLEE STANDARD GAS AND ELECTRIC COMPANY

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STATEMENT OF THE CASE

The opening brief filed by appellant, Securities and Exchange Commission, (Commission) contains an adequate statement of the case, with appropriate record references, and for that reason appellee, Standard Gas and Electric Company, (Standard Gas) deems it unnecessary to include any counter-statement of the case in this brief.

Standard Gas wishes to take exception, however, to the language used in the Commission's statement of the case (Commission's brief, p. 7) to the effect that Standard Gas' former subsidiary service company, Byllesby Engineering and Management Corporation (Byllesby Engineering)[1] "greatly overcharged" Market Street Railway Company (Market Street) for management services. This statement in the Commission's brief is apparently based upon language used in the Commission's Findings and Opinion of September 30, 1949 (P. R. 35)[2] on the basis of the record in the investigatory proceedings as it then stood, the Commission having pointed out, however, that "the settlement was arrived at during the course of the hearings and that, in presenting it to us, Standard (Standard Gas) stated that, if the settlement should not be approved, it desired to proceed with the investigation and that it had retained independent engineers to study and reconstruct the services

[1] The name of the company was changed in 1935 to Public Utility Engineering and Service Corporation (P. R. 38).

[2] "P. R." refers to the printed portion and "T. R." to the typewritten portion of the record in No. 12,716.

rendered under the management contract'' (P. R. 52-53). And appellant William J. Cogan (Cogan) conceded the possibility of Standard Gas recovering, in a suit, more than the amount of its settlement since it is ''in a position to offer evidence of value of the services which were rendered'' (P. R. 195; and see P. R. 221).

COMMENTS WITH RESPECT TO THE BRIEF OF APPELLANTS, COGAN AND JONES

The opening brief of appellants, Cogan and Jones, contains few, if any, record references for the statements of fact contained therein. It is, therefore, difficult, and in many instances impossible, to verify the statements of fact in that brief by reference to the record. Some statements of fact made in the brief do not appear to be contained in the record. It is accordingly respectfully urged that the counter-statement of the case contained in the Cogan and Jones brief be in all respects disregarded by this Court, and that this Court accept the statements of fact contained in the opening brief for the Commission and in the within brief where, in each instance, record references are furnished for each statement of fact.

ARGUMENT

I

The sole basis of objection by Cogan to the Market Street Plan and the inclusion therein of a release of Standard Power and Light Corporation (Standard Power) is the denial to Cogan of a fee.

It may reasonably be inferred that the only reason for the Cogan and Jones appeals is the fact that the Commission has appealed from that part of the district court's order of July 11, 1950, which remanded the matter to the Commission to fix an allowance to Cogan. It is doubtful that Cogan would have appealed from the orders of the district court if the Commission had not taken its appeal.[3] Cogan is interested in a fee for his services in connection with the settlement, and his objection to the Market Street plan stems entirely from the denial to him of a fee for such services. In his argument in the enforcement proceeding in the district court, he said (T. R. 594):

> "Oh, well, when I talk about the compromise settlement I am talking about them denying me a fee."

In the proceeding on the return of the Commission's order to show cause why the Market Street plan should not be approved, Cogan stated that he objected to the plan, "only in so far as my request for a fee is involved in the total" (T. R. 429). Again, in the same proceeding, Cogan stated his position unequivocally (T. R. 433):

"I say that the amended plan is not fair in that it

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[3] The Commission's notice of appeal from the order of July 11, 1950 was filed on August 7, 1950 (P. R. 114). Cogan's notice of appeal was filed on September 7, 1950 (P. R. 115) and Jones' on September 15, 1950 (P. R. 119).

fails to provide a fee or compensation to me for beneficial services rendered to Market Street Railway Company."

It is a fair statement that these appeals are before this Court only because Cogan was denied a fee.

II

The contention of appellants, Cogan and Jones, that the settlement of the Market Street open account indebtedness did not include all claims against Standard Gas and Standard Power is wholly unfounded.

Appellants, Cogan and Jones, argue (pp. 20; 26-28 of their brief) that it was not intended that the settlement of the open account indebtedness of Market Street to Standard Gas, which as of June 30, 1948, amounted to $1,132,691 (P. R. 42), and which indebtedness was settled by a payment to Standard Gas of $512,500 (in December of 1950), was to act as a final settlement of all claims of Standard Gas against Market Street, and of all claims of Market Street against Standard Gas and its subsidiaries, past and present, including Standard Power, now the parent of Standard Gas, but formerly a subsidiary of Standard Gas.

Cogan and Jones have asked that this Court find that Standard Gas, a present subsidiary of Standard Power, settled its open account indebtedness claim against Market Street for substantially less than 50¢ on the dollar and gave Market Street a general release, and at the same time permitted the retention by Market Street of a cause of action against Standard Power, all in the face of the directly contrary findings and opinion of the Commission which were approved by the court below (P. R. 93, 94). Such argument is not only fallacious but does violence to all ordinary standards of intelligent thinking.

The Commission issued an order to show cause why the amended Plan should not be approved (P. R. 19) and, after a hearing thereon, issued its Supplemental Findings and Opinion on March 9, 1950 (P. R. 86-94), wherein it reviewed its Findings and Opinion rendered on September 30, 1949, and the record upon which the same was based, and emphasized the fact that it had regarded the settlement as contemplating a final and complete disposition of any and all claims which Market Street might have growing out of the management fees paid to Byllesby Engineering during the year 1926 and 1935 (P. R. 91-92)[4] and that the Commis-

[4] The Commission said:

"Whatever may be the present disagreement between Cogan and Standard Gas as to what each intended in their negotiations and their eventual settlement, their settlement was not accepted by us as a reason for approving the payment by Market Street to Standard Gas in the amount which we indicated in our prior Opinion could be found to be fair and equitable. In view of Cogan's activities we found it necessary in our prior Opinion to state that we were not accepting Cogan's negotiations as an indicium of fairness and pointed out that we had the duty to appraise the proposed payment independently. Thus, in considering the plan, we had before us what constituted, in effect, an offer of settlement made unilaterally by Market Street as the proponent of a plan for its own dissolution. We were required under the circumstances of the case to treat that offer in the framework of the whole record then before us just as if there had been no agreement between stockholders of Market Street and Standard Gas.[3] The record before us embraced not only the hearings on the plan but a public investigation into relationships and transactions between Market Street, Standard Gas and Byllesby Engineering. An important objective of the investigation was the examination and analysis of the service charges paid by Market Street during the entire period of its history as a company in the Standard Gas system. The record

[3] Cf. *North American Light & Power Company, et al.*, ... S. E. C. .... (1947), Holding Company Act Release No. 7514, plan approved and enforced, 74 F. Supp. 317 (D. Del., 1947), affirmed 170 F. 2d 924 (C. A. 3, 1948).

sion had treated the plan "as one which was offered to resolve all controversies between Market Street and Standard Gas and its subsidiaries, past and present, including Standard Power, as a step in the final winding up and dissolution of Market Street * * *" (P. R. 93-94).

And, to eliminate any possible misunderstanding, the Commission in its March 9, 1950 Supplemental Findings and Opinion required as a further condition to its approval of the Market Street Section 11(e) plan that the plan be further amended "to provide clearly for a complete release of Standard Gas and its subsidiaries, including Standard Power" (P. R. 94).

At no point during the settlement negotiations or in the proceedings before the Commission did Cogan even intimate that he intended to exclude Market Street's claim against Standard Power until he was denied a fee by the Commission (T. R. 557). Almost immediately after the

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establishes that Cogan, who now takes the position that he intended only to settle service charges reflected in the open account after 1930, put into evidence numerous documents and schedules and a mass of correspondence relating to the whole period from 1926 to 1935 and that most of this material was secured by Cogan as a result of subpoenas which we issued at his request. In addition, the service charges during the entire period were the subject of attack by a prior preference stockholder who intervened in an action instituted by Standard Gas against Market Street on the open account claim and who was also a participant in these proceedings. Neither we nor the Court in that action, to which the settlement was presented before the plan was filed, was informed that any participant in the proceedings was reserving the right to make any part of the service charges the subject of independent proceedings. Although the settlement was reached before Standard Gas presented its case, it may nevertheless be noted that, so far as the record covered the point, Standard Gas made no disclaimer of responsibility for any other charges made by Byllesby Engineering, which was a subsidiary of Standard Gas throughout the entire period."

fee denial, he caused an action to be commenced against Standard Power in New Jersey (T. R. 557) and he has since sought to support the position that it was not intended that Market Street's claim against Standard Power be included in the settlement. The record, and particularly Cogan's own statements in the record, does not support him.

Cogan testified before the Commission that the original authorization from Van Kirk authorized him to proceed with any action he saw fit to institute against Standard Gas, Standard Power and Byllesby Engineering (T. R. 468).

The petition filed by Cogan on behalf of the Van Kirk Committee with the Commission (P. R. 120-129), which resulted in the investigatory proceeding, refers specifically to possible claims of Market Street arising out of allegedly exorbitant payments made by Market Street to Byllesby Engineering for management services for the years 1926 to 1932 (P. R. 123)[5]. It must be concluded that Cogan's only reason for initiating that proceeding was to determine whether or not Market Street had a claim or cause of action arising out of the Byllesby Engineering arrangement. If it were found that such a claim did exist, Cogan was authorized to bring such proceedings as he might deem necessary against such party or parties as he thought advisable to enforce the claim (T. R. 468). Cogan and his committee were solely and exclusively concerned with a claim or cause of action on behalf of Market Street.

The Commission's notice of and order for hearing, pursuant to the Act[6], direct that inquiry be made into and evi-

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[5] The Commission's investigation covered payments made from 1926 to 1935, the entire period (P. R. 50-51).

[6] Public Utility Holding Company Act of 1935 (15 U. S. C. Sec. 79).

dence be taken concerning the relationship, past and present, between Market Street and its associated and affiliated companies and the facts and circumstances concerning the management fees paid by Market Street to Byllesby Engineering (T. R. 522, P. R. 38).

At the inception of the investigatory proceeding, there was no misunderstanding between the Commission and Cogan as to its scope, and indeed this unanimity of understanding continued until Cogan was denied a fee by the Commission.

Cogan in his argument on the Commission hearing on the amended plan stated (T. R. 434):

> "The record of investigation before the S. E. C. showed that H. M. Byllesby & Company acquired an interest in Market Street Railway Company in November, 1925, and was instrumental in diverting to Standard Power & Light Corporation the profits resulting from management fees to be charged against Market Street Railway Company by Byllesby Engineering and Management Corporation, and that between 1926 and 1929, inclusive, Standard Power and Light Corporation received a total sum of $270,000 as such profits."

Cogan agreed with the statement of fact in the Commission's Findings and Opinion of September 30, 1949 that, "considerable testimony was taken and documentary evidence adduced with respect to the relationship and transactions between Market Street Railway Company and Standard (Standard Gas) and its affiliates, past and present, and particularly, the services rendered to Market Street by Byllesby Engineering and creation and history of the open account were explored" (T. R. 442-443).

Thus there is no disagreement as to the scope of the investigatory proceedings before the Commission. The Commission was concerned with, and Cogan was interested in, a possible claim on behalf of Market Street arising out of the payment of management fees to Byllesby Engineering.

The settlement negotiations between Cogan on behalf of the Van Kirk Committee and the representatives of Standard Gas were undertaken and concluded before the pending investigatory proceedings were terminated (T. R. 21). The claims which were the subject of discussion and negotiation were (1) Market Street's claim arising out of the Byllesby Engineering management arrangement, and (2) Standard Gas' claim on the open account (P. R. 169-171). Standard Gas' claim was against Market Street exclusively (P. R. 41-42; 169). Market Street's claim was against Byllesby Engineering, which had rendered the services and charged the fees, and Standard Gas and Standard Power which had each received a portion of the fees charged by Byllesby Engineering (49-53; 171). Market Street's claim was a single indivisible claim. Cogan's attempt to segregate a separate claim for Market Street against Standard Power is clearly a rationalization after the fact. This is supported by his admissions that the settlement negotiations covered the relationship back to 1926 (T. R. 438, 466).

In Cogan's argument on the Commission's hearing on the amended plan, he stated that he had not before disclosed his intention to bring suit against Standard Power because he was afraid that Milton Paulson might bring a similar suit (T. R. 439). He entertained some doubt himself as to whether he exercised good judgment (T. R. 439).

Cogan's position was that he had the Standard Power action "up my sleeve" (T. R. 725) and, as stated by his counsel on the argument on the enforcement proceeding in the district court, that he was under no duty to disclose during the settlement negotiations that he did not intend the inclusion of Market Street's claim as against Standard Power and that his silence in this respect was entirely proper. (T. R. 637-640).

The court below properly characterized as a "tricky deal" Cogan's apparent attempt to exclude Standard Power from the settlement (T. R. 741).

It is quite apparent that Standard Power was included in the settlement negotiations and the settlement itself. Mr. Appel, Vice President of Market Street (T. R. 392) testified that the settlement negotiations covered Market Street's claim for management fees paid by Market Street from 1926 to 1935 (T. R. 393) and that the settlement contemplated a complete release on this claim (T. R. 393) including a release to Standard Power (T. R. 398). This was certainly Standard Gas' impression throughout the settlement negotiations (T. R. 474).

Cogan's position is a difficult one—as far as Cogan is concerned. He wants a fee. If this Court sustains the Commission's appeal, he will be denied a fee. He, therefore, wants to preserve his action against Standard Power because, if he is able to do so, he will keep alive the opportunity of getting a fee through the medium of that action. In order to do this he must admit his own lack of good faith in the settlement negotiations. There is obvious personal reluctance to make such an admission; therefore, he must deny the record as he has done and rely on the bare argu-

ment, unsupported by any facts, that Standard Power was not included in the settlement. His entire position is an anomalous one. As the court below pointed out, there is a patent inconsistency in Cogan's request for a fee for negotiating a settlement which he now disavows (T. R. 597).

The truth of Cogan's position was clearly stated by himself (T. R. 597): if the Market Street plan, which includes the settlement and a release to Standard Power, is approved, he is entitled to a fee; if he is not to get a fee, the plan should not be approved.

III

The Commission's determination with respect to the scope of the settlement and its desirability in connection with the Market Street Section 11(e) Plan is properly supported by evidence and cannot be disturbed by this Court.

The petition, which resulted in the Commission's order directing an investigation into the Byllesby Engineering - Standard Gas relationship, charges fraud on the part of these two companies, consisting of alleged overcharges in management fees to Market Street (P. R. 124). The inquiry, as requested by the petition, concerned itself with management fees paid by Market Street to Byllesby Engineering from 1926 to 1935 (P. R. 123, 124). Evidence was taken by the Commission in connection with these charges (P. R. 38, 175). It is evident that in the investigatory proceeding, the Commission was primarily concerned with the determination as to whether Market Street was fraudulently overcharged by Byllesby Engineering for management services rendered Market Street from 1926 to 1935. It is likewise evident that this investigation was sought by

Cogan, et al. and ordered by the Commission not for the purpose of seeking a defense to the Standard Gas claim on open account but rather for the purpose of determining whether Market Street had a claim as a result of these overcharges. If Market Street was found to have a claim, it was apparent that such claim was against Byllesby Engineering, the immediate recipient of the payments, and possibly against Standard Gas and Standard Power for their respective participations in the alleged overcharges.[7] The initiating petition in the investigatory proceeding confines its allegation to relationships between Standard Gas and Byllesby Engineering in connection with these charges and properly so, as Standard Gas may be said to be the ultimate beneficiary of the Byllesby Engineering payments throughout the entire period 1926 to 1935 and this, by reason of the fact that Standard Gas was the parent of Standard Power from 1926 to 1930, during which time payments were made by Byllesby Engineering to Standard Power, and the direct recipient from Byllesby Engineering for the years 1930 to 1935.

These facts, together with admissions by appellant, Cogan, throughout the proceeding, furnish in abundance the evidentiary basis for the Commission's determination that the settlement negotiations contemplated a settlement of Market Street's entire claim resulting from the alleged Byllesby Engineering overcharges and a discharge of liability on the part of anyone who is or may be liable on such claim. Under the decisions, this determination cannot be disturbed.

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[7] Standard Power from 1926 to 1930; Standard Gas from 1930 to 1935 (P. R. 50-53).

In *Mississippi Valley Barge L. Co.* v. *U. S.,* 292 U. S. 282, 287, 78 L. Ed. 1260, 1265, the court, in connection with a determination of the Interstate Commerce Commission, said:

> "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

See also:

Virginia Stage Lines v. *U. S.,* 48 Fed. Supp. 79, 82 (Dist. Ct., W. D. Va., 1942);

Nat. Lab. Rel. Bd. v. *Nevada Consol. Copper Corp.,* 316 U. S. 105, 106-107, 86 L. Ed. 1305, 1307;

Rochester Telephone Corp. v. *U. S.,* 307 U. S. 125, 139-140, 83 L. Ed. 1147, 1157-1158;

Alton R. Co. v. *U. S.,* 315 U. S. 15, 86 L. Ed. 586.

The courts recognize that administrative bodies such as the Commission are charged with the responsibility and possess the technical skills and facilities for consideration and evaluation of the technical and complicated problems within their jurisdictional sphere. The courts have, therefore, properly given great weight to their determinations and are reluctant to disturb them in the absence of evident dereliction. *Conway* v. *Silesian-American Corp.* 186 F. 2d 201, 202 (C. A. 2, 1950). The observations of that court are peculiarly applicable to the settlement here:

> "Since decision here is so highly a matter of judgment, indeed of shrewd appraisal of what may be the possibilities of lengthy litigation as against an immediate smaller payment in hand, we obviously cannot find any sure or pat answer."

In *Gray* v. *Powell,* 314 U. S. 402, 412, 86 L. Ed. 301, 310, the court said:

> "It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action."

As stated by the court in *Virginia Stage Lines* v. *U. S.*, 48 Fed. Supp. 79, 83 (*supra*), in referring to the Interstate Commerce Commission:

> "The function of 'weighing' the evidence, therefore, remains peculiarly one for the Commission 'appointed by law and informed by experience,' and not for the courts. *Alton Railroad Company* v. *United States,* 315 U. S. 15, 62 S. Ct. 432, 86 L. Ed. 586; *Gray* v. *Powell,* 314 U. S. 402, 62 S. Ct. 326, 86 L. Ed. 301."

See also: *Finn* v. *Childs Co.,* 181 F. 2nd 431 (C. A. 2, 1950).

There is no basis in the record before this court for disturbing the Market Street Section 11(e) plan which was approved by the Commission and the District Court.

IV

The settlement, as incorporated in the Market Street Plan and approved by the Commission and the Court below, is supported by substantial evidence.

The basis for the objections of appellants Cogan and Jones to the amended Market Street Plan is that the approval by the Commission of the inclusion of Standard Power in the Market Street release under the settlement agreement is not supported by substantial evidence. The record of proceedings before the Commission indicates quite clearly the extent of the evidence adduced in the investigatory proceedings, which evidence brought into

the record facts available at that time relating to the Market Street-Byllesby Engineering arrangement (P. R. 46-53). The record indicates *quite clearly,* both from the evidence before the Commission and the details of Cogan's participation in the investigatory proceedings, and the settlement negotiations, that the claim or cause of action as far as Market Street was concerned consisted of a single claim against Byllesby Engineering and, possibly, against those corporations which controlled Byllesby Engineering, namely Standard Gas and Standard Power. The Commission summed up the situation in its Supplemental Findings and Opinion, rendered on March 9, 1950 (P. R. 91-92):

> "* * * Thus, in considering the plan, we had before us what constituted, in effect, an offer of settlement made unilaterally by Market Street as the proponent of a plan for its own dissolution. We were required under the circumstances of the case to treat that offer in the framework of the whole record then before us just as if there had been no agreement between stockholders of Market Street and Standard Gas. The record before us embraced not only the hearings on the plan but a public investigation into relationships and transactions between Market Street, Standard Gas and Byllesby Engineering. An important objective of the investigation was the examination and analysis of the service charges paid by Market Street during the entire period of its history as a company in the Standard Gas system. The record establishes that Cogan, who now takes the position that he intended only to settle service charges reflected in the open account after 1930, put into evidence numerous documents and schedules and a mass of correspondence relating to the whole period from 1926 to 1935 and that most of this material was secured by Cogan as a result of subpoenas which we issued at his request."

As the Commission further stated (P. R. 92), neither the Commission nor the court below, where the action of Standard Gas against Market Street was pending, was informed that any party to the settlement agreement had reserved the right to make "any part of the service charges the subject of independent proceedings."

It is significant that on the hearing before the Commission on the Market Street plan, which incorporated the settlement, there was no objection until the Commission rendered its decision denying Cogan a fee.[8] From this point on, the only objections to the Market Street Plan, the amendments to which included clarifying provisions suggested by the Commission to eliminate any possible doubt as to the scope of the settlement and the parties to be released, were made by Cogan and these objections stemmed quite clearly from the fact that he had been denied a fee (T. R. 430, 433).

On the basis of the record before it, and there was no complaint by any party that the record was insufficient, the Commission properly concluded that the reduction of Market Street's indebtedness to Standard Gas and a complete release by Market Street to all of the parties directly or indirectly concerned constituted a fair and equitable settlement and disposition of all existing claims (P. R. 86-94).

The settlement of claims is a recognized reorganization technique and the Commission would be deprived of the means of fulfilling its obligations if it were prevented from determining that complex claims be disposed of

[8] Cogan sought approval of the Market Street plan before the Commission and approval of the settlement of the action pending in California (P. R. 168-179).

through settlement rather than "through long drawn out litigation, of which indefiniteness is an inherently detracting feature." *North American Light & Power Co.,* 170 Fed. (2) 924, 932 (C. A. 3-1948); *Conway* v. *Silesian-American Corporation* 186 F. 2d 201 (C. A. 2-1950).

The Commission cannot be required to go through the motions of "adjudicating the very subject of the settlement" and the Commission's determination in this instance that the settlement, as reflected in the final amended Market Street Plan, was for the best interests of the parties, constitutes its ultimate findings and represents "a judgment based upon the consideration of all the imponderables involved in determining whether the proposed offer met the requirements of being fair, reasonable and adequate." *North American Light & Power Co.,* 170 Fed. (2) 924, 933, *supra.*

It was not the function of the Commission or of the court below to try the issues raised in the complaint in the New Jersey action against Standard Power. *Ladd* v. *Brickley,* 158 Fed. (2) 212, 221 (C. C. A. 1-1946); certiorari denied 330 U. S. 819; *North American Light & Power Co.,* 170 Fed. (2) 924, 931 *supra.* Appellants, whose only real objection to the Market Street Plan, as approved, is the denial of a fee to Cogan, present a very confused argument in support of their attempt to justify Cogan's newly acquired contention that it was not the intent of the parties to the settlement agreement to include a release to Standard Power as a part of the settlement. In the Cogan and Jones brief (p. 42) it is argued that a cause of action arose in favor of Market Street against Standard Gas to recover management fees paid by Market Street from 1930 to 1935 in the

principal sum of $355,000 and that a similar cause of action arose for the overcharges in management fees during the year 1926 to 1929. Appellants' argument is that Standard Gas is liable for overcharges during 1930 to 1935 because it was then the direct recipient of these overcharges and that Standard Gas was liable for overcharges during 1926 to 1929 because during that period it "shared control" of Standard Power. Appellants' argument, therefore, is that Standard Gas was liable to Market Street for overcharges by Byllesby Engineering to Market Street throughout the entire period from 1926 to 1935. Appellants state unequivocally that that is Market Street's cause of action. It is elementary that only one recovery can be had on a single cause of action. Liability thereon may be joint or several or sole but, in no event, can more than one recovery be had. Appellants, recognizing this position as they do in their brief, defend completely and fully their argument, which is at best merely rationalization, that Market Street had severable causes of action.

Thus, it clearly appears that appellants do not seriously contend that there was an absence of substantial evidence before the Commission and the court below to support the amended Market Street Plan, as approved. Appellants' sole quarrel, as far as this case is concerned, is exclusively with the Commission on the question of Cogan's fee and does not concern itself beyond this.

The courts have consistently held that the Commission's jurisdiction over a Section 11(e) reorganization is exclusive. *In re Electric Bond & Share Co.,* 80 Fed. Sup. 795 (S. D. N. Y. 1946); *In re Standard Power & Light Corp.*

(D. C. Del.), 48 Fed. Sup. 716; *Homewood et al* v. *Standard Power & Light Corp.* (U. S. D. C., Del.) Civil Action No. 229, opinion by Leahy, D. J., rendered April 29, 1944.

V

Adequate review was had in the court below.

The settlement phase of the Market Street plan was before the district court on two separate occasions in July, 1950 and November, 1950. In the July, 1950 enforcement proceedings the evidentiary facts considered by the Commission in connection with its approval of the plan were elaborately detailed to the court by Mr. Isaacs, who appeared for the Commission (T. R. 497-563; 662-712). Appellant Cogan and his counsel similarly detailed the evidentiary facts upon which Cogan and Jones relied in support of their objections to the enforcement of the settlement phase of the plan (T. R. 578-644; 712-735). The court thus had before it the evidentiary facts relied upon by both sides.

The court rendered an oral decision from the bench at the conclusion of the argument (T. R. 739-745). The court, however, invited the submission of further material by any party to the proceedings (T. R. 744):

> "If any counsel feel they want to submit anything further in connection with the matter that would make any material difference, I wouldn't want to shut any of you off."

Cogan took no exception to the court's decision and expressed no desire to accept the court's invitation for the submission of any further material which he felt the court should specifically consider. It may fairly be assumed that

Cogan was satisfied with the result (T. R. 745, 746) because of the reversal by the court of the Commissions' findings that Cogan was not entitled to a fee. In any event Cogan, by his conduct in failing to take an exception to the court's decision, and in failing to request the court—pursuant to the court's invitation to reconsider certain phases of the evidence or to request consideration *de novo* of further evidence—has estopped himself from questioning the adequacy of the consideration by the court below in connection with the settlement phase of the Market Street plan. The portion of the record hereinabove referred to creates no conflict with the decision in *Universal Camera Corp.* v. *National Labor Relations Board,* ... U. S. ...; 95 L. Ed. (Adv.) 304 (1951).

There is no substance to Cogan's argument that there was inadequate judicial review by the court below. If, as Cogan argues, there was inadequate judicial review by the court below with respect to the settlement phase of the Market Street plan in the July, 1950 enforcement proceedings, he must then admit that there was likewise inadequate judicial review with respect to that part of the plan which denied him a fee. If he is to be held to any measure of consistency, Cogan must then concede that the court below was wrong in determining that he is entitled to a fee and in remanding the matter to the Commission to fix his fee, and he must further concede that the Commission's appeal to this Court from that portion of the July 11, 1950 order is proper and should be sustained. It is doubtful that Cogan would make this concession.

This argument by appellants Cogan and Jones, like all of the arguments urged upon this Court by these appel-

lants, reflects the difficulties Cogan encounters in attempting to urge disapproval of the Market Street plan as far as the settlement is concerned, and points quite clearly to the conclusion that the sole grievance of appellants Cogan and Jones relates to the Cogan fee denial.

CONCLUSION

The order of the court below in No. 12,716, in so far as it finds that the Commission's disapproval of any provision in the plan for counsel fees for William J. Cogan is not supported by substantial evidence, and remands the proceeding to the Commission for the purpose of approving a reasonable allowance for Cogan, should be reversed.

The remaining provisions of the order of the court below in No. 12,716, and the order of the court below in No. 12,813 should be affirmed.

Respectfully submitted,

A. Louis Flynn

Helmer Hansen

Attorneys for Appellee, Standard Gas and Electric Company.

June 1, 1951.